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SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1110

CLOVER COMPANY, INCORPORATED,
JOHN G. O'MARA,
THOMAS W. BURKS, - - - - - Petitioners,

versus

GENERAL AGENCY, INC.,
STUYVESANT INSURANCE CO., - - Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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CLOVER COMPANY, INCORPORATED,
JOHN G. O'MARA,
THOMAS W. BURKS, - - - - *Petitioners,*

v.

GENERAL AGENCY, INC.,
STUYVESANT INSURANCE CO., - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the Judgment herein of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled Case on October 16, 1969.

OPINION BELOW.

The Opinion of the Court of Appeals was not reported and is printed at Appendix "A" hereto, page 13.

It affirmed a Summary Judgment in favor of Respondents (see Appendix, page 14) jointly and sev-

erally in the amount of $15,009.66, against the Petitioners, jointly and severally, dismissed the Petitioners' Counter-Claim, with prejudice and overruled the Petitioners' Countermotion for Summary Judgment as against Respondents.

JURISDICTION.

The Judgment of the United States Court of Appeals was entered on October 16, 1969 (Appendix "A", page 14). Jurisdiction of Court invoked under 28 U.S.C.A., Section 2106.

QUESTIONS PRESENTED.

1. In holding that the Respondents, who are separate and unrelated parties, by their Amended Complaint, established the Court's jurisdictional minimum amount in controversy under Title 28, U.S.C.A., Section 1132(a), the United States Court of Appeals rendered a decision in conflict with the decisions of other Courts of Appeals and prior decisions of the Supreme Court of the United States on the question of Federal Court jurisdiction.

2. This Court should grant Certiorari to consider whether the Supreme Court's decision in *Erie R. R.* v. *Tompkins,* should not be overthrown as by the holding of the Court below in this Action or again reaffirmed.

3. This Court should grant Certiorari to settle the question of whether the denial of a Jury Trial to Petitioners when Respondents admit the truth of part of

Petitioners' allegations against Respondents is in fact a denial which constitutes a violation of due process of law as to Petitioners as guaranteed by them by the Fifth Amendment of the United States Constitution.

STATEMENT OF CASE.

A. Nature of the Case.

Action was filed by General Agency, Inc., of Pennsylvania, hereinafter referred to as *Managers,* against Clover Company, Inc., hereinafter referred to as *Agent,* on an account for insurance premiums alleged due to *Managers* from *Agent* on business placed with the Stuyvesant Insurance Company, hereinafter referred to as *Company.*

Manager also named two individual *Guarantors* of the Agency, Burks and O'Mara, as Defendants. *Agent* and *Guarantors* answered, denied the obligations, and *Agent* counterclaimed for substantial sum due *Agent* for Countersignature Commissions due from *Manager* in accordance with Kentucky Statutes.

Agent also moved the Court to dismiss the actions on the grounds that the amount in controversy, as established by *Manager,* was less than the amount required to establish jurisdiction of the subject matter by the U. S. District Court.

Manager, by Amended Complaint, reduced the amount that they had requested for relief; joined a new party Plaintiff, *Company,* and asserted a new claim, jointly and severally, against the three Defend-

ants, jointly and severally. Plaintiffs, *Manager* and *Company,* made a motion for Summary Judgment. *Agents* and *Guarantors* countered for a motion for Summary Judgment. Trial Court sustained Plaintiffs' motion, denied Defendants' motion, dismissed Defendants' counterclaim and signed a joint and several judgment against Defendants in favor of the Plaintiffs, jointly and severally.

Appeal was taken to the U. S. Circuit Court for the Sixth Circuit and the Court of Appeals affirmed the findings and the judgment of the lower Court without opinion (see Appendix "A," page 14).

B. Statement of Facts.

This case arose out of the operations of an insurance agency in which *Agent* agreed to produce insurance business and to perform other functions connected with the operation of the insurance business under an agency agreement (Plaintiffs' Exhibit A) with *Manager*.

Business produced was to be placed and underwritten by *Manager* under a separate agency agreement between *Manager* and *Company* as follows: "*Agent*" was to produce insurance business, for which it would receive a 25% commission of the net business produced, according to the Agency Agreement. The business would be written in the name of the Stuyvesant Insurance Company (or "*Company*") provided it was otherwise acceptable for underwriting reasons and *within the Provisions of the Kentucky State Statutes and/or Regulations of the Kentucky Department of Insurance.*

The Agency Agreement, in addition, called for *"Agent"* to countersign policies written by Out-of-State Agents on Kentucky residents.

On January 3, 1964, *Managers* and *Guarantors* entered into an agreement guaranteeing the indebtedness of *Agent* to *Managers*. *Company* was not a party to the Guarantee Agreement and is not mentioned in said agreement.

During approximately the one year period in which the parties did business and, in accordance with the Agency Agreement, *Agent* countersigned out-of-state business in a volume of approximately $46,441.82. Kentucky Revised Statute 304.099 (Appendix, page 14) and regulations of the Kentucky Department of Insurance provide for a commission of *one-half of the usual commission* to be paid to the Kentucky *Agent* who countersigns such business.

Upon notice of the cancellation of the Agency Agreement, on December 22, 1964, *Agent* claimed credit for this countersignature of commission.

In April, 1966, *Managers* sued *Agents* and *Guarantors*, for the unpaid balance of the account alleged to be $10,423.82, plus an additional claim which the Complaint itself demonstrated had never matured nor was it then due and owing.

Agent answered and counterclaimed denying indebtedness and pleading a set-off as against any amount due *Managers*.

Guarantors, by separate answers, denied the allegations of the Complaint as to indebtedness.

Agents and *Guarantors* filed interrogatories in answer to which *Manager* admitted that, as of June, 1966, the balance due was less than $10,000 and the amount in controversy should be reduced to $9,925.83.

Agents' motion to dismiss was overruled by the trial court and *Manager* was allowed to file an amended complaint.

On October 17, 1967, *Managers* filed an amended complaint revising their demand to $9,879.70. By this same amended complaint, a new party Plaintiff, *Company,* was added who claimed $5,129.82 due it. The combined amount demanded by the two Plaintiffs was $15,009.66. Judgment was demanded, jointly and severally, against the Defendant, *Agent* and *Guarantors. Agents* answered in counterclaim and based their set-off on the interpretation of KRS 304.099. The point was briefed by the parties. Plaintiffs, by affidavit of D. R. Klock, an officer of *Company,* admitted that no commission had been paid *Agent* on the policies countersigned by *Agent. Company* further admitted that no payment of commission had been made in most cases, to non-resident producing agents. *Agent,* therefore, claimed the full commission as producing agent rather than the 50% allowed by the Statute to it as the countersigning agent.

REASONS FOR GRANTING THE WRIT.

In holding that two individual Plaintiffs could join together their two separate and distinct claims for the purpose of conferring upon the Federal Court the jurisdiction to hear their case, the District Court for

Western District of Kentucky rendered a decision and the Sixth Circuit Court of Appeals upheld the decision in conflict with the United States Supreme Court's decisions directly to the contrary as well as those decisions of the Sixth Circuit Court of Appeals. The rule as set out by the Supreme Court of the United States is as follows:

> "Where several plaintiffs assert separate demands in single suit, amount involved in each separate controversy must be of requisite amount to be within jurisdiction of district court, and amounts cannot be added together to satisfy jurisdictional requirements. *Clark* v. *Paul Gray, Inc.*, 59 S. Ct. 744, 306 U. S. 583; see also *Stucker* v. *Roselle,* D. C. Ky. 1941, 37 F. Supp. 864; *Barr* v. *Rhodes,* D. C. Ky. 1940, F. Supp. 223."

Original Plaintiff, *Manager,* in this action admits by its Amended Complaint that its claim is not sufficient to satisfy jurisdictional requirements of Title 28 U.S.C.A., Section 1332.

The District Court allowed Plaintiff, *Manager,* over objections of the Defendant, *Agent,* to amend its original Complaint to add a second, separate and distinct plaintiff, *Company,* so that the aggregate amount of the two distinct claims would then reach a total amount in excess of $10,000.00 (namely, $15,009.66 of which $9,879.70 is due *Manager* and $5,129.82 is due *Company* the plaintiffs allege in this Amended Complaint).

The Supreme Court has, in numerous cases, held that a Plaintiff cannot establish jurisdiction by combining individual claims of several Plaintiffs.

Clark v. *Paul Gray, Inc.*, 306 U. S. 583, 59 S. Ct. 744;

Scott v. *Frazier*, 253 U. S. 243, 40 S. Ct. 503;

Pinel v. *Pinel*, 240 U. S. 594, 36 S. Ct. 416;

Chamberlin v. *Browning*, 177 U. S. 605, 20 S. Ct. 820;

Clay v. *Field*, 138 U. S. 464, 11 S. Ct. 419.

This rule has been followed as authority by the following Circuits:

Alfonso v. *Hillsborough Co. Avia. Auth.*, CA 5, Fla., 308 F. 2d 724;

Niagara Fire Ins. Co. v. *Dyess Furn. Co.*, CA 5, Ala., 292 F. 2d 232;

Century Ins. Co. v. *Mooney*, CA 10, Kan., 241 F. 2d 910;

Black & Yates v. *Mohogany Asso.*, CA 3, 129 F. 2d 227, cert. denied 317 U. S. 672, 87 L. Ed. 539, 63 S. Ct. 76;

Woerter v. *Orr*, CA 10, Okla., 127 F. 2d 969;

Peterson v. *Sucro*, CA 4, 93 F. 2d 878;

Miller v. *Natl. City Bank*, CA 2, N. Y., 166 F. 2d 723.

(2) In granting the Judgment entered by the District Court in this case, the District Court failed to follow the Kentucky Case Law as handed down by the Kentucky Court of Appeals, the highest appellate court in the State of Kentucky, interpreting that statutes which have been passed for the purposes of regulating the insurance industry within the State of Kentucky.

This Court should grant Certiorari to consider whether the Supreme Court's decision in *Erie R. R.* v. *Tompkins,* should not be overthrown as by the holding of the Court below in this action or again reaffirmed.

The Court below in granting the summary judgment in favor of the Appellees held contrary to the rule established in the case of *Erie R. R.* v. *Tompkins,* 304 U. S. 64-92, wherein the Court held that:

> "Except in matters governed by Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."

The statutes, the subjects of the controversy herein have been interpreted by the highest court of the state. The Supreme Court in *Ruhlin* v. *New York Insurance Co.* reiterated the rule in the following language:

> "The celebrated ruling of Erie R. R. v. Tompkins denies to Federal Courts the right to decline to follow State Courts decisions upon the interpretation of a Contract even in the absence of a State Statute upon the subject."

The holding of U. S. Court of Appeals for the Sixth Circuit is contrary to the law as established by the Supreme Court and other U. S. Courts of Appeals and Certiorari should be granted to re-establish the rule as set out in *Erie R. R.* v. *Tompkins* as the rule governing the action of Federal Courts in interpreting the law of the States.

This Court should grant Certiorari to settle the question of whether the denial of a Jury Trial to Peti-

tioners when Respondents admit the truth of part of Petitioners' allegations against Respondents is in fact a denial which constitutes a violation of due process of law as to Petitioners as guaranteed by the Fifth Amendment. The Appellants in the District Court requested a jury trial. The Appellees in their motion for summary judgment alleged that there was no material for issue of fact. In their brief filed with the United States Court of Appeals for the Sixth Circuit, the Appellees, at page 16, denied that the Appellants were entitled to a recovery on a counterclaim, but at page 16 of said brief, made the following admission:

> "But giving Appellants the benefit of every doubt the undisputed records show that they are entitled to a credit of only $27 on the judgment entered herein."

Appellants, of course, would not agree with the amount that is admitted by the Appellees but they do submit that the admission of even the slightest amount is an admission that there is a *material issue of fact* still unresolved, and that this issue is an issue to be decided by a jury and not by the court. To deny the Appellants of this right to a jury trial is the denial which constitutes the violation of due process of law as granted to the Appellees by the Fifth Amendment.

CONCLUSION.

Appellants, therefore, submit to the Court that the law as stated by the decision of the United States Court of Appeals for the Sixth Circuit is in conflict with the laws established by the Supreme Court of the United States and the United States Courts of Appeals for the other circuits as is stated in reasons one and two of this petition.

And that the Judgment of the United States Court of Appeals for the Sixth Circuit denies the Petitioners due process of law as it is provided for them by the Constitution of the United States in that as stated in reason three, it denies the right of a trial by jury.

It is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 19,303

GENERAL AGENCY, INC., OF PENNA.,
THE STUYVESANT INSURANCE
COMPANY, - - - - *Plaintiffs-Appellees,*

v.

CLOVER COMPANY, INC.,
JOHN G. O'MARA,
THOMAS W. BURKS, - - *Defendants-Appellants.*

ORDER—Filed October 16, 1969.

Before: WEICK, EDWARDS, and COMBS, Circuit Judges.

This is an appeal from a summary judgment for plaintiffs in an action by a general agency and the intervenor insurance company against a state agent and two guarantors to recover the amount of premiums due under an insurance agency contract.

Appellants contend that the district court had no jurisdiction because the amount involved was less than $10,000, and that the court did not give proper consideration to a counterclaim.

Upon consideration, we are of the opinion that the judgment of the district court is correct. Accordingly, the judgment is affirmed.

Entered by order of the Court:
/s/ Carl W. Reuss,
Clerk,

KRS 304.099.

KRS 304.099. Countersignature of policy or bond written by nonresident agent; sharing commissions.

(1) Except as provided in KRS 304.103, all bonds and policies covering subjects of insurance located or to be performed in this state which are placed by or through a licensed nonresident agent shall be countersigned by a duly licensed resident agent of the insurer. (1962 c 80, Para. 1. Eff. 6/14/62. 1956 c 216; 1950 c 21).

(2) The countersigning resident agent and the nonresident agent shall share equally in the commissions derived from all bonds and policies requiring countersigning by this section. (1962 c 80, Para. 1. Eff. 6/14/62. 1956 c 216; 1950 c 21).

* * * * * * *

JUDGMENT OF DISTRICT COURT.

There being no dispute in the record as to the amount due the plaintiffs by the defendants herein, motions for summary judgment having been made by the plaintiffs and defendants and having been briefed and argued, and the Court being sufficiently advised.

It Is Hereby Ordered and Adjudged that the plaintiffs, General Agency, Inc., of Penna., and The Stuyvesant Insurance Company, have judgment against the defendants, Clover Company, Inc., John G. O'Mara and Thomas W. Burks, jointly and severally, in the sum of $15,009.66 with

interest thereon at the rate of 6% per annum from the date of this judgment until paid, and for their costs herein expended.

It Is Further Ordered and Adjudged that the counterclaim of the defendant, Clover Company, Inc., and all other responsive pleadings seeking affirmative relief on behalf of the defendants, or any of them, be and they are dismissed with prejudice and It Is Further Ordered and Adjudged that the countermotion for summary judgment of the defendants be and it is hereby overruled.

It Is Further Ordered and Adjudged that this is a final judgment, there being no just cause for delay and all issues having been disposed of by entry of this judgment.

/s/ Henry L. Brooks,
United States District Judge.

November 19, 1968

* * * * * * *